

**U.S. Department of Labor**

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**Issue Date: 28 February 2007**

CASE NO.: 2006-LHC-00598

In the Matter of

**M. M.,**

Claimant

v.

**NEW YORK CONTAINER TERMINAL,**

Employer

and

**SIGNAL MUTUAL INDEMNITY ASSOCIATION,**

Carrier

Appearances:

Robert J. Helbock, Esq., for Claimant

Robert N. Dengler, Esq., for Employer

Before:

PAUL H. TEITLER

Administrative Law Judge

**DECISION AND ORDER**

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S. § 901 et seq. ("the Act"), and the regulations promulgated there under. A hearing was held before me in Cranford, New Jersey on August 7, 2006. Claimant has submitted five exhibits, marked CX 1-5. Employer has submitted twelve exhibits, marked EX 1-12.

**ISSUES PRESENTED**

- 1) Was the Claimant injured in a work-related accident on July 25, 2005?
- 2) If so, did this injury render the Claimant disabled:
  - a) from July 25, 2005 to October 7, 2005?

- b) from October 14, 2005 to August 6, 2006?
- 3) Section 7 medical benefits.

### SUMMARY OF THE EVIDENCE

#### *Claimant's Testimony*

Claimant testified at the hearing held on August 7, 2006 in Cranford, New Jersey. Claimant testified as follows. Claimant was employed as a driver by New York Container Terminal. On July 25, 2005, Claimant was working in manual labor, where he had been working for a few days. He was working in a crew of three with Timmy O'Neill and a man named Joe. Approximately an hour after lunch, Claimant asserts that he injured his back. It is hard to tell from the transcript, but either the Claimant was the driver and stressed his back while backing boxes out of the container, or he hurt his back while trying to prevent items from falling. (Tr. at 16).<sup>1</sup> Claimant drove the high-lo for the rest of the day. He testified that he spoke to his supervisor, "Frenchie" Barba, that same day. (Tr. at 17). Claimant was on restricted duty due to a prior injury to his lower back, incurred on October 30, 2002, for which he had sought treatment from his primary physician and chiropractors. (Tr. at 18-19). When Claimant returned to work following this prior injury, he returned as a driver. On July 25, 2005, Claimant was not working as a driver because he had been told by Mr. Tanzi, his job supervisor, to report to manual labor following an incident with a co-worker. (Tr. at 19-20).

Claimant testified that he spoke to his supervisor, Frenchie, on the day of the accident after leaving work, and thinks he went to the doctor the next day. (Tr. at 20). He went to Dr. Gallagher, a chiropractor, who recommended he be treated three to four times per week. He testifies that his doctors recommended he not return to work until the end of October, but that he in fact returned a couple weeks early. (Tr. at 21). He said he returned early because he felt better and wanted to work. He returned to his position as a sidebar driver. Claimant worked for four days and had to stop due to extraordinary pain. He left work during a break and went to the chiropractor. He called his supervisor, Angelo Spano, and told him that he had left and the he hoped to be back in the next day or within the next few days. Claimant said he also spoke to Sonny a couple days after he left in October. Claimant has not returned to work since. (Tr. at 22-24).

Claimant continues to see his chiropractor. He saw an orthopedist, Dr. Wilen, who recommended three to four treatments per week. Dr. Wilen told him he could not work, and wanted him to have an MRI. Claimant says that he only goes to the chiropractor once every other week, and can not obtain an MRI because he has no insurance and can not afford to pay for it out-of-pocket. (Tr. at 25).

On cross-examination, Claimant testified that he was in an automobile accident in 1992 in which there was a settlement. He could not recall what his injuries were. In 1994, he was in an accident in a taxi cab; he recalled that he hurt his neck, but could not recall other injuries. He filed a lawsuit in connection with that accident, and it had recently settled. (Tr. at 26-27).

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<sup>1</sup> "Tr." refers to the hearing transcript throughout.

Claimant only remembered receiving treatment for his neck. (Tr. at 29). In 1998, Claimant worked for Mannix Windows (or Interstate Window Corporation). He injured his lower back when he pulled a muscle. He remembered receiving back pay, but could not recall a settlement of \$6,000 reached in July 2000. (Tr. at 30-31).

Claimant began working on the waterfront in 1999 or 2000 as a driver of a hustler tractor. This was a heavy duty job. Claimant could not recall whether he began this work while he had the workers compensation claim against Mannix Windows was still pending. Claimant was seeing Dr. Campano, a chiropractor at the time. Claimant acknowledged the doctor's reports which indicate that Claimant was still working during his treatment in October 2000. Claimant also acknowledged that he reached a settlement of \$6,000 with Mannix Windows on November 14, 2000. That document was received into evidence and shown to the Claimant. (Tr. at 35-36). In December 2000, Claimant says he was injured, sustaining a hernia, while working for New York Container. He was also out of work periodically in 2001 and 2002. From February 2002 to June 2002, Claimant was out of work due to lower back pain. (Tr. at 36). He was treated by a chiropractor during that time. He sought disability during that time. Claimant was injured again in October 2002 while working for New York Container and was out of work for over a year due to his low back. He returned to work in November 2003. (Tr. at 37-38). He returned to his regular job as a sidebar driver. Claimant received a settlement in connection with that injury as well, approximately \$35,000. Claimant worked for almost two years before the instant alleged accident, during which his prior injury did not prevent him from working. He also engaged in extra work for cruise lines during this time. (Tr. at 38-39).

At the time of the July 2005 accident, Claimant was assigned to the warehouse, which he viewed as a punishment. (Tr. at 40-41). He told Frenchie, Philip Barba, about the injury at some point that same day. Claimant switched positions with Tim O'Neill, and drove the hi-lo for the remainder of the day. Claimant did not return to work until a couple days after the accident, at which time he met with Sonny and filled out an accident report. (Tr. at 42-43). Claimant was out of work until October 2005 due to the pain in his back. He also was on a suspension during the same time for failing a drug test. (Tr. at 44). That suspension ended on approximately October 2, 2005. He returned to work about the same time. He worked for several days driving the sidebar, and then left work on October 11, 2005 when his back began bothering him again. Claimant testified that he spoke to Sonny and Angelo Spano at that time. He went to his chiropractor. (Tr. at 45-46). Claimant testified that he has never had any discussions with Dr. Piazza about whether he can presently return to work. Dr. Julowitz is Claimant's treating physician, but he has seen Dr. Piazza at times. Neither doctor has told Claimant that he is unable to return to work, but Claimant was told that he needs continuous treatment and tests. (Tr. at 48-49).

### *CX 1 and CX 3*

CX 1 and 3 are S.O.A.P. notes from Dr. Piazza's office. Both exhibits cover office visits from July 28, 2005 to October 19, 2006, except that CX 1 is missing October 19, 2005-March 20, 2006. On October 10, 2005, the note says the Claimant will return to work the following day, and that he was improving. There is some discrepancy in the reporting. For instance, on October 10, 2005, CX 1's notes say that Claimant is in pain, with a pain of 6 on a scale of 10,

and the doctor treating as Dr. Abrams. CX 3 for the same date, however, states that Dr. Piazza was the doctor, and that Claimant reported that he was unable to work due to pain, with a pain of 6 on a scale of 10. It says he should stay home and not work.

#### *CX 2*

CX 2 is a form filled out by Claimant at his initial visit with Dr. Piazza on July 28, 2005. It recounts his personal history. Claimant indicated he had a stiff neck, backache, painful tail bone and hernia. Claimant stated that he injured his lumbar spine while unloading cargo and had not worked since that date. He indicated a previous injury but stated that he had been working pain free for the past two years. Constant weakness was noted in both legs. Range of motion was limited and accompanied by pain.

#### *CX 4*

CX 4 is a medical report from Dr. Piazza dated October 19, 2006. He diagnosed Claimant with a disc protrusion at L5/S1, bilateral sciatic neuritis, and lumbar subluxation. The report indicates that Claimant is currently working, but was out of work from July 25, 2005 to October 11, 2005, returned to work for five days, and then was out until August 2006.

The doctor stated that Claimant has intermittent pain in his lumbar back, radiating into the buttocks and thighs with weakness in both legs. He reported a previous injury from October 30, 2002 which caused a lumbar disc protrusion at L5/S1 with narrowing and compression as indicated on an MRI from March 28, 2003. Dr. Piazza recommended that Claimant get another MRI to the lumbar spine and continue with chiropractic treatment one to two times a week for eight weeks.

#### *CX 5, Dr. John Piazza<sup>2</sup>*

Dr. Piazza was deposed on November 9, 2006. Dr. Piazza is a chiropractor. He first examined Claimant in connection with this accident on July 28, 2005. Claimant reported a work injury, and an old injury to the lumbar spine from October 2002, but stated that he had been pain free for the two previous years. (CX 5 at 6-10). Dr. Piazza reviewed an MRI from 2003 at some point, which indicated a disk protrusion at L-5/S-1 with compression of the nerve root. The doctor was not aware of other accidents, or automobile accidents.

Dr. Piazza requested a lumbar MRI, which was not conducted, and x-rays of the back. The x-rays showed L4-L5 malposition, which may cause pain and lost range of motion. Dr. Piazza recommended that the Claimant stay out of work and come in for treatment three to four times per week. (CX 5 at 11-12). Each time the Claimant came in, the treating doctor would document their findings in the S.O.A.P. Notes. Following the initial examination, Dr. Piazza prepared a report and sent it for authorization on August 2, 2005. (CX 5 at 17). There was some discussion about the S.O.A.P. note dated October 14, 2005. The typed notes the doctor had differed from what was provided to counsel. The doctor testified that he did not why that one date would vary between the two copies. (CX 5 at 21-27).

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<sup>2</sup> This exhibit was submitted without an exhibit number. I have assigned it the number CX 5.

The Claimant was given a note on October 7, 2005, indicating he could return to work on October 11<sup>th</sup>. The next doctor's S.O.A.P. is on the 14<sup>th</sup> and indicates that Claimant was unable to work again. (CX 5 at 28-29). C-4 reports (for billing) filled out by the doctor indicate that Claimant was continually working, but the S.O.A.P. notes indicate that he was not. Dr. Piazza's last exam and narrative report, from October 19, 2006, indicate that Claimant was unable to work from July 25, 2005 to October 11, 2006. (CX 5 at 32-33). The C-4 forms were corrected to reflect that Claimant was not working, upon the doctor realizing this at the last exam. (CX 5 at 35).

Dr. Piazza continues to treat Claimant, once a week on average. Claimant indicated to the doctor that treatment helped him perform his everyday activities. (CX 5 at 43). Claimant returned to work in August 2006 due to financial reasons. The doctor testified that he believed the injury to be causally related to the July 2005 accident, but stated that he was not aware of a prior motor vehicle accident. (CX 5 at 44-45). Dr. Piazza was asked if there was an exacerbation of a pre-existing condition or an injury related solely to the incident on July 25<sup>th</sup>:

My professional opinion, it could be a combination of both to be forthright, you know a herniated disk is a permanent injury, and due to the nature of his job – a herniated disk can be pre-exacerbated and get worse, but due to some of his symptoms, and in the past where he had the herniated disk prior to seeing me, he said he worked pain-free for two years. Now he's continuously in pain ... until this day still says he works in pain, so I would say this injury has gotten worst or it's a new injury.

(CX 5 at 45). Dr. Piazza has recommended continued chiropractic care and an MRI to the Claimant. (CX 5 at 46).

Dr. Piazza testified that he previously treated Claimant in 2001 for a neck injury, and in all had treated him approximately eighty times. (CX 5 at 48-52). Dr. Piazza has not been paid for much of the treatment he has provided Claimant. (CX 5 at 58).

#### *EX 1*

This exhibit is the initial accident report dated July 28, 2005. It states that the accident occurred on the 25<sup>th</sup> at 10:30am, and that the Claimant continued to work. Claimant reported that he twisted his back the wrong way while stripping a container. The nature of the injury is listed as: back pain, sore ankle and heel, and pain in the buttocks. The report indicates that Claimant was going to see the doctor that day. Tim O'Neill is listed as a witness to the accident. The report is signed, but it is illegible.

## *EX 2*

EX 2 is the OWCP filing in relation to the alleged accident of July 25, 2005. Page 10 is LS-203, on which Claimant writes that Employer knew of the accident on the same date it occurred. The time of the accident is stated as 10:30 a.m. throughout the paperwork.

## *EX 3*

This exhibit contains medical records dated after the alleged accident on July 25, 2005. The first is a record from Dr. Piazza's office dated August 2, 2005. Claimant reported no significant medical history. Dr. Abrams examined the Claimant and reported reduced lumbar range of motion. Radiographs from July 28, 2005 showed "left lateral flexion malposition of L4-L5 (subluxation)." Dr. Abrams diagnosed Claimant with lumbar subluxation at L4-L5, suspected herniated lumbar disc and bilateral sciatic neuritis. Dr. Abrams requested a lumbar MRI and recommended treatment three times a week. He opined that the prognosis was guarded, with probable recurring symptoms and intermittent exacerbation of pain.

The next record is from Dr. Miller's office dated August 4, 2005. Claimant reported a prior low back injury from November 2003, and that he was told he had a herniated disc. Dr. Miller examined the Claimant. He found no muscle spasm on palpation of the cervical and lumbar spines. There was no loss of cervical or lumbar lordotic curve noted, and good range of motion for Claimant's age on all planes. Straight leg raising was negative bilaterally at 65 degrees. Both upper and lower extremities returned normal results. Dr. Miller diagnosed a resolved lumbo-sacral strain/sprain. Dr. Miller opined that the July 25, 2005 accident caused an exacerbation of the pre-existing condition, which has since resolved. Dr. Miller found absolutely no positive objective findings on examination, and no clinical finding of a herniated disc. He found Claimant capable of working full time in his pre-accident position, with no need for orthopedic treatment.

Claimant was referred by Dr. Piazza to Dr. Denny Julewicz for computerized testing of his range of motion and muscle strength. A report from Dr. Julewicz is included. He conducted MYOTEST testing on Claimant on August 22, 2005. The testing consisted of inclinometry and dynametric muscle testing, and a validity profile. Claimant's inclinometry in the lumbar spine revealed an impairment of 4% on flexion, 5% on extension, 3% on right lateral flexion, and 2% on left lateral flexion. The dynametric muscle testing revealed no weakness in Claimant's muscle strength. All testing was found to be valid.

On October 7, 2005, there is a note from the chiropractor's office indicating that Claimant is able to return to work full time on October 11, 2005. The NY State Workers' Compensation billing form was accordingly filled out that Claimant was returning to work and not disabled.

There is an Independent Medical Examination report from Dr. Robert Dennis dated April 6, 2006. Dr. Dennis mentions in his report the two prior occasions on which he had examined Claimant related to a work-related accident on October 30, 2002. Claimant then complained of low back pain, and Dr. Dennis found there to be no evidence of orthopedic pathology. Presently,

Claimant complained of low back pain that switched from side to side. He indicated that it did not go into his legs. Upon examination, Claimant exhibited a normal gait. The results of the lumbar spine were significantly different between the distracted and non-distracted observation. No spasm was found, and trigger points were negative. Dr. Dennis opined that there was a voluntary attempt to complain of pain during the exam, with no clinical findings to correlate. Claimant's complaints were inconsistent. Straight leg raising achieved 90 degrees on multiple attempts. There was a moderate limitation of motion found in the neck, but with no pain, and full range of motion in both shoulders. Dr. Dennis reviewed objective medical records prior to the July 2005 accident, and subsequent records related to this accident. No objective studies since the current accident were provided.

Dr. Dennis concluded that Claimant was magnifying his symptoms, and that the clinical examination did not support his complaints. He diagnosed Claimant with a resolved lumbosacral strain/sprain and a pre-existing and unaltered degenerative disease of the lumbar spine. He opined that Claimant could return to work full time without restrictions and does not require further treatment as his orthopedic conditions are stable. Dr. Dennis writes: "His conditions arise from prior injury and conditions that existed for many years, and have little to do with the lumbar sprain which is resolved, that can be related to this isolated recent injury of July 2005." With regard to the length of the resolved sprain, Dr. Dennis wrote "[Claimant] could have returned to work, and should have remained at work ever since his treating chiropractor sent him back to work in October, 2005."

Dr. Wilen, an orthopedic surgeon, conducted x-rays of the lumbar and thoracic spines on May 9, 2006. The findings were: no fractures or dislocations, muscular spasms, and other modalities needed for clinical correlation.

#### *EX 4*

This is the Order dated December 24, 2003 approving the Section 8(i) settlement.

#### *EX 5*

Claimant was deposed on June 7, 2006. He described the day of the accident, July 25, 2005. Claimant had been working heavy labor in the warehouse for the couple days preceding this date, and his lower back had begun to hurt. On July 25<sup>th</sup>, Claimant was restacking boxes on a pallet. In an effort to prevent boxes from falling, Claimant reached up over his head and felt a severe pain in his back. He believed this occurred in the afternoon. He testified that he spoke with Frenchie, and was told to ask his partner if he could drive. He asked Tim O'Neill if he could drive. He recalled telling Frenchie about his pain, but couldn't recall whether he told him about the particular accident or not. (EX 5 at 53-57).

Claimant stated that he returned to work in October because he felt better and wanted to work. (EX 5 at 65). He worked for a few days, and then left during his lunch break because his back was bothering him. He called Angelo Spano and told him he was going to the doctor and not returning to work. Since October 2005, Claimant has been treated by Dr. Piazza, Dr. Julowitz, and also saw Dr. Wilen.

Claimant stated that he is in constant pain and discomfort. Sitting for a half hour causes pain. He indicated that he is somewhat restricted at home; he can do laundry, lift grocery bags, but can't drive for longer than 45 minutes to an hour. (EX 5 at 78-80). Claimant testified that he walks everyday, or every other day, approximately two miles or 30 to 45 minutes. He also stretches.

Following his 2002 accident, Claimant returned to work and did not miss any work. He had some discomfort in the back, but it did not prevent him from working. (EX 5 at 85-87). Claimant stated the pain he has now is worse than it was following the 2002 accident. The pain is constant now. He also stated that some days he feels fine. (EX 5 at 87-88). Claimant stated that he does not take any medication because he does not like it and he has a weak stomach. (EX 5 at 89).

*EX 6*

New York Workers' Compensation Board file pertaining to Claimant's July 21, 1998 claim against a prior employer.

*EX 7, Philip Barba*

Philip Barba, aka "Frenchie," was deposed on November 2, 2006. He testified that he is the foreman of the warehouse at New York Container Terminal. As foreman, Mr. Barba's job is to assign jobs and make sure the employees work. He testified that he remembers Claimant working on July 25, 2005, but that Claimant never reported an injury to his lower back to him. (EX 7 at 5). If someone is injured, they are supposed to report to notify Mr. Barba, or the safety man, but normally it is Mr. Barba. Claimant never notified Mr. Barba on that day. He also did not speak with Sonny or Mr. Monahan that day. The next day, the 26<sup>th</sup>, Mr. Barba was told that Claimant was injured the previous day. (EX 7 at 8-9). Mr. Barba could not remember who had told him. The normal procedure when someone reports an injury to Mr. Barba is for him to then call the safety man. (EX 7 at 11). Mr. Barba never took this step because the injury was never reported to him. (EX 7 at 12).

*EX 8, John Tanzi*

John Tanzi was deposed on November 2, 2006. He testified that he works at New York Container Terminal where he has worked for approximately twenty-five years. He has been a yard foreman for the past six or seven years. About twenty to thirty men work under him, and he is responsible for making sure each person is performing his job. His employees use hustlers (tractors), side bars, top loaders and hi-los.

Claimant has worked for Mr. Tanzi for approximately seven years as a sidebar driver. Mr. Tanzi testified that Claimant was assigned to the warehouse on July 25<sup>th</sup> after not doing his job on the side bar and receiving a few warnings. (EX 8 at 7). Mr. Tanzi testified that he assigned both Claimant and Mr. O'Neill to the warehouse as a punishment. (EX 8 at 8). Mr. Tanzi testified that Claimant returned to work after the July 2005 accident and worked

approximately a month, at which time he quit, getting off his machine and leaving. (EX 8 at 8). Claimant has since returned to work, in August 2006, as a sidebar driver, working ten hour shifts and asking/receiving overtime. Mr. Tanzi testified that Claimant has not complained of any back pain to him. (EX 8 at 9).

#### *EX 9*

EX 9 is an intake form filled out by Claimant at Dr. Piazza's office on July 28, 2005. On the form, Claimant indicated that an accident occurred at work, and that he reported the accident to his employer. He also indicated that he had retained an attorney.

#### *EX 10*

This exhibit is the payroll records from New York Container Terminal, indicating that Claimant returned to work on August 14, 2006 as a side bar operator. The records indicate overtime worked for each week from August up until the records were requested in October.

#### *EX 11, Dr. Robert Dennis*

Dr. Robert Dennis was deposed on November 16, 2006. Dr. Dennis is an orthopedist who is in private practice treating patients and providing forensic examinations. Approximately 50% of the examinations are for plaintiffs, and the other 50% on behalf of defense attorneys, the Department of Labor, courts or the Attorney General. Dr. Dennis is board certified in orthopedic surgery and by the American Board of Independent Medical Examiners.

Dr. Dennis previously saw Claimant on July 10, 2003 and March 4, 2004 in connection with a previous claim. (EX 11 at 9). He saw him in connection with the current claim on April 6, 2006 and wrote a report that was admitted as EX 3. Dr. Dennis obtained a history from Claimant that Claimant had re-injured his lower back while working in the warehouse. (EX 11 at 12). Dr. Dennis then conducted a physical examination. He found a normal neurology and muscle function in the lower extremities based upon examining Claimant's gait. (EX 11 at 12-13). Dr. Dennis also examined Claimant's lumbar spine, testing range of motion, with inconsistent results, indicating voluntariness of response. (EX 11 at 13). There were also no positive findings at the trigger points, indicating no tenderness or real pathology. (EX 11 at 14-15). Straight leg raising produced "enormous" variations. Reflexes were normal. Dr. Dennis opined that Claimant was magnifying his symptoms, and the doctor found no objective abnormalities in the lumbar spine. (EX 11 at 16).

Dr. Dennis testified that he felt there was symptom magnification on the prior occasions that he saw Claimant. (EX 11 at 16-17). The pre-existing medical records included an MRI dated March 28, 2003 that Dr. Dennis reviewed. Dr. Desena found a left paracentral disc protrusion at L5-S1 causing mild to moderate narrowing and compression of the nerve root. Dr. Dennis did not review the reports of the chiropractor between the time Claimant was released to work in October 2005 and the date of Dr. Dennis' evaluation in April 2006. (EX 11 at 37-38). On re-direct examination, Dr. Dennis was asked to look at the reports, which included Dr. Piazza's indications that Claimant was not disabled during this time period. (EX 11 at 44-45).

Dr. Dennis concluded that the Claimant was not disabled and required no further treatment. (EX 11 at 20).

*EX 12<sup>3</sup>, Timothy O'Neill*

Timothy O'Neill was deposed on November 2, 2006. He testified that he is a longshoreman. On the day of the alleged accident, Mr. O'Neill was driving a hi-lo forklift while two other men, including Claimant, worked with him as laborers. Their supervisor was Mr. Barba. That day Mr. O'Neill did not drive the hi-lo all day, but rather alternated positions with Claimant because Claimant had complained of pain in his back all day. Then as Mr. O'Neill was moving a pallet, Claimant went to stop it from tipping over, and reached up, then yelled that he had been hurt. (EX 12 at 4-5). Frenchy stopped by a few times that day and inquired as to why Claimant was driving. Mr. O'Neill testified that he told Frenchy that Claimant was driving because his back was hurting. This was sometime around noon or in the afternoon. (EX 12 at 5).

Mr. O'Neill is a sidebar operator. He has known Claimant for eight years. They were both working in the warehouse for a two-week period as a punishment. (EX 12 at 6). John Tanzi, Mr. O'Neill's foreman, assigned him to work there. Claimant had complained about his back on the morning of July 25<sup>th</sup>. Then with regards to the alleged accident, Mr. O'Neill testified, "I couldn't see it. I was driving the machine, there was a pallet, it was very high ... and he was on the other side of it ... it was going to tip forward and fall. He went behind to stop it." (EX 12 at 8). When asked if he actually saw Claimant try to stop the pallet, Mr. O'Neill said that he was assuming Claimant did because Claimant went around to the other side when it began falling. (EX 12 at 8-9). Mr. O'Neill thinks this was reported to Mr. Barba because Mr. Barba came by later and said that Claimant had an injury. (EX 12 at 12).

**DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In arriving at a decision in this matter, the Administrative Law Judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459 (1968) reh'g. den. 391 U.S. 929 (1968); Todd Shipyards v. Donovan, 300 F.2d 741 (5<sup>th</sup> Cir. 1962); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985).

The person seeking benefits under the Longshore Act has the burden of persuasion by a preponderance of the evidence. Director, OWCP v. Greenwich Collieries, 312 U.S. 267 (1994). Such burden of persuasion obliges the person claiming benefits to persuade the trier of fact of the truth of a proposition. This burden is not met where the person claiming benefits simply comes forward with evidence to support a claim.

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<sup>3</sup> I believe this Exhibit was mistakenly marked as EX 3. I have assigned it the number EX 12.

## **Injury- Section 20(a) Presumption**

Employer here contests the claim that Claimant sustained injuries from an accident on July 25, 2005. Employer argues that there is no evidence that an accident actually occurred. Section 20 (a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 144 (1991); Gencarelle v. General Dynamics Corp., 22 BRBS 170, 174 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once the claimant invokes this presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. Merrill, 25 BRBS at 144. If the employer does rebut the presumption, then the administrative law judge must weigh all evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280, 286 (1935).

In order to invoke the Section 20(a) presumption, a claimant must prove his prima facie case. A claimant proves his prima facie claim for compensation by establishing two elements: (1) the claimant sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work that could have caused the harm or pain. United States Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 615 (1982); Kelaita v. Triple A Machine Shop, 13 BRBS 326, 331 (1981).

Claimant testified that his lower back had begun to hurt after working heavy labor in the warehouse. On July 25, 2005, his lower back was hurting all morning, and then he felt a sharp pain when he reached above his head to prevent pallets from falling. His co-worker, Timothy O'Neill, testified that Claimant had been complaining about his low back all day, and that at one point Claimant yelled out in pain while trying to prevent a pallet from falling. He did not see this happen because Claimant was on the other side of the pallet.

To support his prima facie case of injury, Claimant has submitted the medical reports from Dr. Piazza's office, showing that he sought treatment on July 28, 2005, and has continued to treat with this office until the present time. Dr. Piazza believes that Claimant was injured on July 25, 2005 and still has an injury, and recommends obtaining an MRI. Dr. Miller opined that Claimant exacerbated a pre-existing condition. Dr. Dennis, who performed an IME, opined that Claimant sustained a lumbar sprain, but that it has since resolved. An injury under the Act may be an aggravation, or acceleration, of a pre-existing condition. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986); Laplante v. General Dynamics Corp./ Elec. Boat Div., 15 BRBS 83 (1982). Here, Claimant had a previous back injury, but had been working since 2003. He alleges that the current injury is a worse injury to his back and left him unable to work.

To support his prima facie case of an accident or conditions that could have caused his injury, Claimant testified to the events of July 25, 2005. The testimony of his co-worker, Mr. O'Neill, also supports Claimant's assertion that there was an accident on that date. A claimant's theory as to how an injury occurred must go beyond "mere fancy." Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982). Here, Claimant's contention is not "mere fancy"; his

version of events is completely in sync with where he was working, the work he was performing, and his co-worker's recollection.

Based upon the foregoing, I find that Claimant has set forth a *prima facie* case and therefore is entitled to the presumption. The burden therefore shifts to the employer to rebut the presumption. In order to do so, the employer must put forth substantial countervailing evidence which severs the connection between the harm and the employment. Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 144-145 (1990). Employer intimates that the accident never happened. As support, it points out discrepancies with the reported timing of the accident, and the fact that Claimant's co-worker, Mr. O'Neill, did not actually see an accident. This, however, is insufficient to overcome the presumption. There is no dispute that Claimant was working in the warehouse on July 25, 2005 in heavy labor. His testimony about having difficulty with the heavy pallets is corroborated by his co-worker. His testimony that his back had been hurting all day is also corroborated. Therefore, Claimant is entitled to the presumption that his injury is causally related to his employment.

### **Nature and Extent of Disability**

Claimant contends that he was totally disabled from the date of the accident, July 25, 2005, to October 7, 2005, and from October 14, 2005 until August 5, 2006. Employer contends that Claimant was never totally disabled.

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. He must show not only that he has a disability, but that he is disabled due to the work-related injury, and not due to some other medical problem. Misho v. Dillingham Marine and Manufacturing, 17 B.R.B.S. 188 (1985). If Claimant meets this burden, Employer must establish the existence of realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Mills v. Marine Repair Service, 21 BRBS 115, 117 (1988); American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976), *aff'd*, 2 BRBS 178 (1975); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59, n.7 and related text (3d Cir. 1979).

Claimant is currently working. He returned to work full time in August 2006. Therefore there is no issue of Suitable Alternative Employment. The issue to be decided is whether he was totally disabled during the two periods he was out of work since July 25, 2005.

#### *July 25, 2005 to October 7, 2005*

After the accident on July 25, 2005, Claimant first sought medical treatment at Dr. Piazza's office on July 28<sup>th</sup>. This is a facility he had been treated at in 2001 for a neck injury, but had not been currently receiving treatment. On his intake form, Claimant indicated that he had already obtained counsel. On the same date, he filled out a work-accident report with his employer. Apparently there was a drug test administered, which Claimant failed, and he was

placed on suspension by his Employer. This suspension was scheduled to end in the beginning of October. During this time Claimant received chiropractic care from Dr. Piazza and Dr. Abrams. On October 10th he was cleared to return to work by Dr. Piazza's office. Claimant returned to work on October 11<sup>th</sup>. He testified that he wanted to return to work at that time because he felt better and wanted to work.

Employer contends that Claimant was only out of work during this time because he was on a suspension, not because he was injured. Claimant contends that this is coincidental. Dr. Piazza treated Claimant on July 28, 2005, at which time he conducted x-rays of the back and recommended that Claimant not work and receive treatment with his office approximately three times per week.

Dr. Miller then examined Claimant on August 4, 2005. Dr. Miller is a Board Certified Orthopedic Surgeon. Dr. Miller found good range of motion on all planes. Straight leg raising was negative bilaterally. He diagnosed a resolved exacerbation of a pre-existing condition. He found absolutely no objective findings on examination and stated that Claimant was capable of returning to his pre-injury employment, and did not require further care.

To support Dr. Miller's position, Dr. Julewicz, to whom Claimant was referred by Dr. Piazza, examined Claimant on August 22, 2005 and found normal results during MYOTEST testing. The testing showed minor impairments (4% on flexion, 5% on extension, etc.), and as found to be valid by the doctor. Claimant even testified that Dr. Julewicz, not Dr. Piazza, was his treating physician:

Well, I'm being seen by Dr. Julowitz (ph.) and Dr. Piazza. Dr. Julowitz is my treating physician. At times I've seen him and at times I've seen Dr. Piazza.

(Tr. at 48).

Dr. Miller's and Dr. Julewicz' opinions that there is no impairment are not undermined by Dr. Piazza's office records. There is no further objective evidence to support the doctor's initial diagnosis, and on October 10, 2005, without any evidence of a change in condition, Dr. Piazza clears Claimant to return to work full time at his pre-injury employment. Just the week prior, the records indicated a pain level of 7 out of 10. The pain is described on October 10, 2005 as "dull and achy," just as it had been described in the previous notes.

I find for the reasons above that Claimant was injured following an accident on July 25, 2005, but that it quickly resolved. This finding is supported by the medical findings of Drs. Miller and Julewicz, and is not undermined by the treatment records of Dr. Piazza's office. Neither is it undermined by Claimant's own testimony, which does not indicate any medical reason for his return to work in October, other than he just "felt better." While this may well be the truth, there is nothing to substantiate a change or reason why he could not have returned to work earlier. The only objective reason why Claimant could not have returned to work earlier was that he was prohibited by the company since he was suspended. Therefore, Claimant is found to have been disabled from the date of the accident, July 25, 2005, to August 4, 2005, at which time Dr. Miller diagnosed Claimant with a resolved injury.

*October 14, 2005 to August 14, 2006*

Shortly after returning to work in early October, Claimant left work again until August 2006. Claimant was treated by Dr. Piazza's office. He testified that he has not had discussions with his doctors about whether he could presently return to work or not. Claimant testified to his total disability on August 7, 2006, and returned to work one week later, August 14, 2006. Since returning to work, Claimant has not missed work and there is documentation of overtime for every week.

The Claimant's testimony is not credible. His version of the facts is inconsistent, his period of disability happened to coincide with his suspension, and Claimant testified at the hearing that he was currently totally disabled. Then, seven days later, he returned to work full time at pre-injury capacity, and has even worked overtime.

Likewise, Dr. Piazza's records are unreliable. First, as mentioned above, the change in the doctor's opinion, back and forth, is unsubstantiated. There is no objective reason why Claimant was cleared to work in October. Then, the forms to New York state that indicate that Claimant was working and that he was not disabled. These forms are October 2005 through June 2006. In EX 3 we see the forms that attest to the fact that Claimant is not disabled; the last one in record is for the date July 11, 2006. Dr. Piazza testified that at some point these forms were corrected to indicate a disability. Even Dr. Piazza's office notes (S.O.A.P. notes) do not indicate that Claimant was disabled for this period. Two different entries are submitted for October 14, 2005; the one not discussing a disability and the other indicating "patient to stay home/no work." This appears to be an addition to the doctor's notes that was added at a later date. Overall, this office's records are not clear as to the Claimant's level of disability, or length of disability, and, in fact, at times contradict themselves.

Dr. Dennis is a Board Certified Orthopedic Surgeon and Board Certified Independent Medical Examiner. He examined the Claimant on April 6, 2006 and testified in relation to the case. Upon examination, he found Claimant's complaints to be inconsistent, with no clinical findings to support them. The doctor found a normal gait, no spasm, and negative trigger points. He diagnosed Claimant with a resolved strain of the lumbosacral back. He found Claimant able to work full time without restrictions.

I give greater weight to the finding of Dr. Dennis for two reasons. First, the testimony of Claimant and Dr. Piazza's records are unreliable. Second, Dr. Dennis' opinion is corroborated by Claimant's own actions. It is Dr. Dennis' conclusion that "[Claimant] could have returned to work, and should have remained at work ever since his treating chiropractor sent him back to work in October, 2005."

Therefore, I find that Claimant has not met his burden of proving total disability for the time period of October 11, 2005 to August 14, 2006.

## Section 7

Section 7 (a) of the LHWCA provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. Section 907 (a)

This has been interpreted to mean that the employer must provide for expenses that are reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 523, 539 (1979).

In the present case, Dr. Piazza continues to maintain that Claimant needs continued treatment, at the rate of several sessions per week. However, Dr. Miller found on August 4, 2005 that Claimant no longer required treatment. Likewise, Dr. Dennis found that Claimant did not need treatment for the period from October 2005 to August 2006.

Chiropractic treatment is reimbursable to the extent that it consists of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings. Here, Dr. Piazza and Dr. Abrams reported a subluxation in the spine at L4-L5. I find that the only period of time for which Claimant is entitled to medical expenses is for the period of disability from July 25, 2005 to August 4, 2006. These are the only expenses which have been shown to be reasonable and necessary, as they followed a lumbosacral strain/sprain incurred on July 25, 2005 and resolved by August 4, 2006.

### **ORDER**

Based upon the foregoing findings of fact, conclusions of law and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

#### **IT IS ORDERED THAT:**

1. Claimant is entitled to compensation based upon his average weekly wage for total temporary disability from the date of the accident, July 25, 2006, to August 4, 2006.
2. Employer is responsible for the payment of medical benefits that were obtained during this period pursuant to Section 7.
3. Claimant's counsel is entitled to attorney's fees and costs as set forth in 20 CFR 725.366 (a).
4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have thirty (30) days to file any objection thereto.

5. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

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PAUL H. TEITLER  
Administrative Law Judge

Cherry Hill, New Jersey